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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

NO.....

KRAUSS BROS. LUMBER COMPANY, a corporation, *Petitioner*,

vs.

DIMON STEAMSHIP CORPORATION, a corporation, Claimant of the steamship "Pacific Cedar," her engines, etc., *Respondent.*

PETITION

FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND

BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable CHARLES E. HUGHES, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

PRAYER

The petitioner, Krauss Bros. Lumber Company, a corporation, prays that a writ of certiorari issue to review the decree entered January 10, 1933, by the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause (R. 85).

DECREE BELOW

Such decree of the United States Circuit Court of Appeals for the Ninth Circuit dismissed petitioner's libel in admiralty to the extent that a maritime lien was asserted against the steamship "Pacific Cedar" (R. 86).

QUESTION PRESENTED

Whether a maritime lien exists against a carrying vessel in favor of a lumber shipper for return of excess freight money—being the difference between

the tentative maximum rate actually paid ($10.00 per M ft.) and the applicable minimum rate rightly retainable ($8.50 per M ft.) under affreightment contract stipulating:

> "Rate of freight $10 per M feet net measurement. * * * In event regular intercoastal carrier moves similar cargo at lower rate such lower rate to be applied." (R. 5, 9, 26, 72, 73, 74, 82, 86.)

SUMMARY OF FACTS

In November, 1929, petitioner Krauss Bros. Lumber Company, as shipper, and respondent Dimon Steamship Corporation, as carrier, signed an affreightment contract, whereby certain lumber cargo was to be loaded in January, 1930, on the Pacific Coast at the ports of Puget Sound and Grays Harbor aboard the steamship "Pacific Cedar," to be transported to the Atlantic Coast, and to be discharged at the ports of Philadelphia and New York, all in consideration of freight, the rate and amount thereof to be determined by the following clauses:

> "Rate of freight $10 per M feet net measurement. * * * In event regular intercoastal carrier moves similar cargo at lower rate such lower rate to be applied." (R. 5, 9.)

Pursuant to such engagement, said steamship "Pacific Cedar" loaded said cargo at agreed Pacific Coast

ports in January, 1930, and, after transportation in due course, discharged the same at agreed Atlantic Coast ports in March, 1930. During such discharge respondent, in behalf of said steamship "Pacific Cedar," demanded and collected from petitioner the freight on said lumber cargo at the rate of $10 per M feet. (R. 5, 6.)

During the month of January, 1930, the Luckenbach Steamship Company, a "regular intercoastal carrier," moved similar cargo from Seattle, Washington, to Boston, Massachusetts, at a lower rate, to-wit: $8.50 per M feet. (R. 6.)

Later, petitioner demanded from respondent return of freight in the amount of the difference between the $10 rate paid and the $8.50 rate applicable. Such demand was refused. (R. 6.)

Upon May 18, 1931, petitioner's libel in *personam* against respondent, and in *rem* against said steamship "Pacific Cedar," was filed in admiralty, alleging for a cause of action the facts above summarized, seeking repayment of such excess freight, and asserting a maritime lien therefor (R. 8, 12). Said steamship, upon due process in *rem*, was forthwith attached and, by respondent on bond, was promptly released (R. 12, 16, 21).

On June 18, 1931, respondent filed exceptions to said libel upon two grounds: (1) that no maritime lien existed (R. 26); (2) that the cause of action alleged was non-maritime in nature, and not within the admiralty jurisdiction (R. 25).

RULINGS OF LOWER COURTS

IN REM;

The District Court, considering the exception attacking the maritime lien, in this case and in several sister cases, upon hearing (R. 26), and rehearing (R. 32), concluded: that the pledge of service and compensation between ship and cargo being reciprocal, the rights to a maritime lien must be reciprocal (R. 29, 35); that the lien of the shipowner against cargo having been lost by delivery of cargo, the lien of the cargo owner against the ship could not exist thereafter (R. 30, 36); that a maritime lien can arise only from some contract or occurrence, relating to the service of the ship, which must be visible, manifest and physical, serving as notice to the world of the claim (R. 30, 36); and hence that no maritime lien was present (R. 30, 38). The District Court sustained said exception (R. 39); and dismissed said libel in *rem* by decree entered September 14, 1931 (R. 40). Petitioner duly noted exception (R. 41).

The Circuit Court of Appeals, concurring, concluded that to enforce a lien against the ship, where neither owner or master of the ship on the one hand, nor owner of cargo on the other, knew the facts upon which the lien was predicated until after right delivery of the cargo, and where no visible fact or occurrence gave notice of the lien to the public, would extend the maritime lien beyond reason and beyond authoritative decision (R. 72, 73, 74). The Circuit Court of Appeals held that, under the circumstances of this case, no maritime lien existed, and by its decree entered January 10, 1933, dismissed said libel in *rem* (R. 86).

IN PERSONAM:

Being extraneous to the maritime lien question presented, the rulings of the lower courts in *personam* upon the exception attacking the maritime nature of the cause of action and the admiralty jurisdiction are condensed to the merest recital:

(a) The District Court, concluding that the cause of action was non-maritime and that admiralty had no jurisdiction (R. 28, 31, 34, 39), dismissed said libel in *personam* by decree entered September 14, 1931 (R. 41);

(b) The Circuit Court of Appeals, concluding the contrary (R. 65-72) after several intermediate orders

(R. 75, 78, 79), reversed the District Court, and by its decree entered January 10, 1933, remanded the cause in *personam* for trial upon issues raised by the answer of the Ancillary Receivers of the respondent (R. 86).

REASONS FOR GRANTING WRIT

I. Conflict of Decisions Between Circuit Courts of Appeals

The decision of the Circuit Court of Appeals for the Ninth Circuit in the present case is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case entitled *The "Oregon," et al., v. Pittsburgh & Lake Angeline Iron Co.* (*The "Oregon"*), 55 Fed. 666, wherein the opinion was written in 1893 by Chief Justice Taft, then a circuit judge.

The report of the earlier decision, respecting material facts, discloses: That the vessel "Palms" was chartered at a flat rate of freight, and by the charterer was sublet to a shipper at a higher rate; that on discharge of cargo the shipper paid to the master the full higher rate; and that the charterer, to collect the difference between the higher rate received and the flat rate retainable by the shipowner, asserted a maritime lien by libel in *rem* against the vessel.

The report of the earlier decision, respecting the ruling, discloses: That while the opinion of Chief Justice Taft discussed and accepted the jurisdiction of admiralty over the claim asserted, the maritime lien was assumed and was enforced without comment. However, the existence of a maritime lien was a legal essential to the decree of the court entered against the vessel.

II. Question Justifies Settlement by this Court

On shipments by foreign carriers or tramp vessels lacking local representation supporting process service in *personam*, in transactions with domestic shipowners having inadequate capital or utilizing single hull corporations, under affreightments by major lines in times of financial depression, in dealings with general ships covered by various charters and subcharters befogging personal responsibility, and also in recoveries following precipitous embargoes upon goods and sudden commandeering of tonnage—a maritime lien for freight returnable is conducive to promptitude of adjustment, frequent in application, and vital to security of payment. All merchants moving cargo, and all companies operating ships, are concerned in the existence and the extent of such a lien.

Hence the Circuit Court of Appeals, by denying the maritime lien in this litigation (R. 74, 86) has decided an important question of federal law. It has not been, but should be, definitely settled by this court.

In three cases this court has rendered decisions on the merits of suits instituted in *rem* against the vessel, based upon claims for the return of freight in whole or in part. In each instance the existence of the maritime lien was assumed without discussion.

B. L. Harriman v. Emerick, 76 U. S. (9 Wall.) 161, 19 L. Ed. 629 (1870);

Allanwilde Transportation Corp. v. Vacuum Oil Co., 248 U. S. 377, 39 S. Ct. 147, 63 L. Ed. 312 (1919);

International Paper Co. v. Gracie D. Chambers, 248 U. S. 387, 39 S. Ct. 149, 63 L. Ed. 318 (1919).

III. Conflict with Applicable Decisions of this Court

The Circuit Court of Appeals, by denying the maritime lien against the vessel for freight unearned, has decided a federal question in this case (R. 74, 86) in probable conflict with applicable decisions of this court.

B. L. Harriman v. Emerick, 76 U. S. (9 Wall.) 161, 19 L. Ed. 629 (1870);

Allanwilde Transportation Corp. v. Vacuum Oil Co., 248 U. S. 377, 39 S. Ct. 147, 63 L. Ed. 312 (1919);

International Paper Co. v. Gracie D. Chambers, 248 U. S. 387, 39 S. Ct. 149, 63 L. Ed. 318 (1919).

These decisions by this court have not been accepted as unequivocal, but nevertheless they are applicable.

IV. Conflict with Weight of Authority

The existence of a maritime lien against a vessel to recover freight money in excess of the amount agreed or earned is a question of general maritime law, important to all directly engaged in commerce by water.

The decision of the Circuit Court of Appeals for the Ninth Circuit in this case, denying such a lien, is against the great weight of authority, whether measured by the number of decisions, the ranking of the courts, or the reasoning of the opinions.

The decisions cited are analyzed in the accompanying brief.

Tatsuuma Kisen Kabushiki Kaisha v. Robert Dollar Co., 31 Fed. (2d) 401 (1929, C. C. A. 9);

The Capitaine Faure, 10 Fed. (2d) 950 (1926, C. C. A. 2);

The Esrom, 272 Fed. 266 (1921, C. C. A. 2);

The Oregon, et al., v. Pittsburgh & Lake Angeline Iron Co., 55 Fed. 666, 668, 669, 676, 677 (1893, C. C. A. 6);

The Sudbury, 33 Fed. (2d) 293 (1929, Cal. D. C.);

The Emilia S. De Perez, 22 Fed. (2d) 585 (1927, Md. D. C.);

The Fredensbro, 18 Fed. (2d) 983 (1927, Pa. D. C.);

The Henry W. Breyer, 17 Fed. (2d) 423 (1927, Md. D. C.);

The Muskegon, 10 Fed. (2d) 817, (1927-N. Y. D. C.)

The G. A. Tomlinson, 279 Fed. 786 (1922-N. Y. D. C.)

The Ada, 233 Fed. 325 (1916-Md. D. C.)

The Oceano, 148 Fed. 131 (1906-N. Y. D. C.)

The Port Adelaide, 59 Fed. 179 (1893-N. Y. D. C.)

The Wyoming, 36 Fed. 493 (1888-Mo. D. C.)

The St. Joseph, Fed. Cas. 12230 (1878-Mich. D. C.)

The Emma, Fed. Cas. 18218 (1876-Miss. D. C.)

The A. M. Bliss, Fed. Cas. 274 (1872-Mass. D. C.)

The Hardy, Fed. Cas. 6056 (1870-Minn. C. C.)

The St. Joseph, Fed. Cas. 3908 (1855-Ill. C. C.)

Church v. Shelton, Fed. Cas. 2714, (1855-Mass. C. C.)

The Panama, Fed. Cas. 10703 (1846-N. Y. D. C.)

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

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Proctor for Petitioner.

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G. H. BUCEY,
Central Building,
Seattle, Washington,
Of Counsel.

UNITED STATES OF AMERICA
STATE OF WASHINGTON, } ss
COUNTY OF KING.

LANE SUMMERS, being first duly sworn, on oath deposes and says:

That he is an attorney at law, admitted to practice before the Supreme Court of the United States; that he is one of the proctors for petitioner in the above entitled cause; that he prepared the foregoing petition in good faith and not for delay; that said petition in his opinion is meritorious and well founded in law; that he has read said petition, knows the contents thereof, and believes the same to be true.

LANE SUMMERS.

Subscribed and sworn to before me this 20th day of February, 1933.

SEAL

G. H. BUCEY,
Notary Public in and for the State of Washington, residing at the City of Seattle.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

NO.....

KRAUSS BROS. LUMBER COMPANY, a corporation, *Petitioner*,

vs.

DIMON STEAMSHIP CORPORATION, a corporation, Claimant of the steamship "Pacific Cedar," her engines, etc., *Respondent.*

BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Two opinions were delivered by the District Court. Both were written by District Judge Jeremiah Neterer, being filed upon July 14, 1931, and August 4, 1931. The opinion on the original hearing (R. 26) was not reported; the opinion on rehearing (R. 32) was reported in 53 Fed. (2d) 492-495.

The opinion of the Circuit Court of Appeals (Circuit Judges Wilbur and Sawtelle, with District Judge

Norcross—written by Circuit Judge Wilbur) was filed September 8, 1932, (R. 64) and was reported in 61 Fed. (2) 187.

Extraneous to the question presented, and pertinent only to questions in *personam*, said Circuit Court of Appeals, upon respondent's petition for modification, filed opinion November 7, 1932 (R. 76); such opinion has not yet been reported.

JURISDICTION

Jurisdiction of this court is invoked under Judicial Code section 240(a) as amended by act of February 13, 1925, Ch. 229 (43 Stat. 938; 28 U. S. C. A. section 347).

The decree of the Circuit Court of Appeals to be reviewed was entered January 10, 1933 (R. 86).

Petition for writ of certiorari was filed February ——, 1933.

No petition for rehearing has been filed relative to such final decree.

Explanatory of the lapse of time between rendition of the opinion of the Circuit Court of Appeals and its final decree, there was interposed by respondent petition seeking modification solely of that portion of the opinion and decree of the Circuit Court of Ap-

peals filed and entered September 8, 1932, which awarded judgment against respondent in *personam* (R.74); such petition was granted and said decree entirely vacated by orders filed upon November 7, 1932, (R. 75, 77, 78) and also upon December 22, 1932, (R. 78, 79). Thereafter the original decision in *rem* upon the maritime lien question here presented was reinstated by final decree entered January 10, 1933, (R. 86).

FACTS

The recital of material facts in the petition may be emphasized by summary repetition. Petitioner, as shipper, and respondent, as carrier, signed an affreightment contract for loading, carriage and discharge of lumber cargo, in consideration of freight, the rate and amount thereof to be determined by provision as follows:

> "Rate of freight $10 per M feet net measurement. * * * In event regular intercostal carrier moves similar cargo at lower rate such lower rate to be applied." (R. 5, 9).

During discharge respondent, as carrier, demanded and collected from petitioner freight at the rate of $10.00 per M feet (R. 6).

Contemporaneously, on a parallel voyage, the Luckenbach Steamship Company, a "regular intercostal

carrier," moved similar cargo at a lower rate, to-wit: $8.50 per M feet (R. 6).

Later petitioner demanded from respondent return of the freight in the amount of the difference between the $10.00 rate paid and the $8.50 rate applicable (R. 6). Such demand was refused (R. 6, 7).

Subsequently petitioner's libel was filed (R. 3, 12) in *personam* against the respondent, and in *rem* against the steamship "Pacific Cedar," which, on due process, was attached (R. 12, 14).

To said libel respondent filed exceptions: in *personam*, upon the ground that the cause of action alleged was non-maritime and outside of admiralty jurisdiction; in *rem*, upon the ground that no maritime lien existed (R. 25, 26.) The District Court sustained both exceptions (R. 41.) The Circuit Court of Appeals reversed the District Court as to the exception in *personam*, and affirmed the District Court as to the exception in *rem* (R. 86).

No petition for rehearing in the Circuit Court of Appeals was filed as to its final decree entered January 10, 1933.

QUESTION PRESENTED

Whether a maritime lien exists against a carrying vessel in favor of a lumber shipper for return of ex-

cess freight money—being the difference between the tentative maximum rate actually paid ($10.00 per M ft.) and the applicable minimum rate rightly retainable ($8.50 per M ft.) under affreightment contract stipulating:

> "Rate of freight $10 per M feet net measurement. * * * In event regular intercostal carrier moves similar cargo at lower rate such lower rate to be applied." (R. 5, 9, 26, 72, 73, 74, 82, 86).

ARGUMENT

I. Conflict of Decision Between Circuit Courts of Appeals

As asserted by the petition, the decision of the Circuit Court of Appeals in the present case is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case entitled *The "Oregon," et al. v. Pittsburgh & Lake Angeline Iron Co.* (*The "Oregon"*), 55 Fed. 666, wherein the opinion was written in 1893 by Chief Justice Taft.

The report of the earlier decision as to material facts discloses: That the vessel "Palms" was chartered at a flat rate of freight, and by the charterer was sublet to a shipper at a higher rate; that on discharge of cargo the shipper paid to the master the full higher rate; and that the charterer, to collect the difference between the higher rate received and

the flat rate retainable by the shipowner, asserted a maritime lien by libel in *rem* against the vessel.

The report of the earlier decision as to the ruling discloses: That while the opinion of Chief Justice Taft discussed and accepted the jurisdiction of admiralty over the claim asserted, the maritime lien was assumed and was enforced without comment. However, the existence of a maritime lien was a legal essential to the decree of the court entered against the vessel.

Substantiation of the foregoing epitome appears from the following extracts:

> "The libels were filed in the district court * * * *against the propeller Oregon and the schooner Palms*, * * *." (55 Fed. 668).
>
> "*In the libel against the Palms*, in addition to the foregoing averments, it was charged that the captain of the Palms had collected from the consignee of the iron ore carried upon one of the trips, to whom the libelant had sold the tonnage for that trip, $104 more than the charter rate, which belonged to libelant as profit upon the sale of the tonnage, and which the captain turned over to respondents." (55 Fed. 669).
>
> "The master in the district court found that *the two vessels had violated their contracts*, * * *. *He also found for libelant against the Palms for $104*. The district court confirmed the findings, and entered the proper decree, which was affirmed by the circuit court. The difference between the contract and going rates of freight when libelant bought tonnage to carry the car-

goes for the lost trip was 80 cents a ton, making $840 damages chargeable to each vessel, as well as the $104 additional *against the Palms.* (55 Fed. 669.)

"There remains to consider only the $104 *charged against the Palms.* This was the profit of 10 cents a ton on one trip of that vessel where the libelant sold the tonnage to Harvey Brown at $1.80 per ton. * * * The captain of the Palms collected the entire freight from Brown, and turned it over to Gilchrist, managing owner of the Palms. The 10 cents a ton, or $104, of the freight belongs to the libelant, and *the Palms or her owners* should pay the same to the libelant. But the jurisdiction of this court in admiralty to render a decree for the money is denied on the ground that the cause of action is not maritime, but is a mere right to sue for money had and received at common law. *As the collection of the $104 was incidental to the execution of the maritime contract sued on, and may be regarded as an overcharge of freight* by appellants against appellee under that contract, we think the amount fairly recoverable as damages for its breach, and therefore fully within the admiralty jurisdiction. The decrees of the circuit court in both cases are affirmed." (55 Fed. 676, 677).

The former decision in the Sixth Circuit Court involved charterer's claim, based on an implied obligation, to collect from the shipowner freight in excess of the amount rightly retainable after payment by the subcharterer. The present decision in the Ninth Circuit Court involves shipper's claim, based on express agreement, to recover from the shipowner

freight in excess of the amount rightly retainable after payment by the shipper. In both decisions a maritime lien was asserted. By the Sixth Circuit Court the lien was enforced; but by the Ninth Circuit Court the lien was denied.

In the older case the original charter did not contemplate the possible payment by any subcharterer, and hence the obligation of the shipowner to repay to the charterer excess freight or hire arose merely by implication of law, and not from any provision of the charter party. In the present case the affreightment contract did contemplate the possible payment of excess freight by the petitioner as shipper, and hence respondent's obligation as carrier to repay the excess portion arose by express agreement. An examination of the differences of fact involved in the two decisions demonstrates no resultant difference in applicable principles. Therefore the decisions are in conflict.

II. Question Justifies Settlement by this Court

For the sake of uniformity, the Constitution extended the judicial power of the United States to all cases of admiralty and maritime jurisdiction. The peculiar distinguishing feature of this jurisprudence is the maritime lien. Hence the determination of the

character and extent of the maritime lien is a matter of importance, justifying the consideration of this court.

Heretofore in three cases this court has rendered decisions on the merits of admiralty suits in *rem* against the vessel, based upon claims for the return of freight in whole or in part. In all of these cases the existence of the maritime lien was assumed without comment.

B. L. Harriman v. Emerick, 76 U. S. (9 Wall.) 161, 19 L. Ed. 629, (1870).

Allanwilde Transportation Corp. v. Vacuum Oil Co., 248 U. S. 377, 39 S. Ct. 147, 63 L. Ed. 312, (1919).

International Paper Co. v. Gracie D. Chambers, 248 U. S. 387, 39 S. Ct. 149, 63 L. Ed. 318, (1919).

In the first of the cases cited, the cargo owner being granted a recovery against the vessel for the prepaid portion of freight, the existence of the maritime lien was essential to this court's decision. In the two later cases, the consideration by this court of the merits of the controversies was unnecessary, and all expressions of opinion were *dicta*, if the maritime lien was non-existent.

This court has repeatedly ruled that, in the absence of jurisdictional foundation, a decision on the merits will not be rendered.

Mansfield, etc. Co. v. Swan, 111 U. S. 379, 384, 28 L. Ed. 462, 464, (1884).

Minnesota v. Northern Securities Co., 194 U. S. 48; 48 L. Ed. 873, (1904).

Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413; 55 L. Ed. 521 (1910).

U. S. v. Mayer, 235 U. S. 55, 70; 59 L. Ed. 129, 136, (1914).

In the light of such rule, all of the cases decided by this court involving a maritime lien against a vessel for freight should be considered as recognition of the lien. Nevertheless, the two later cases especially have not been accepted as determinative. Reflecting uncertainty is the negative ruling of the Circuit Court of Appeals in the present case and previous judicial comment, as follows:

> "The libelant urges the Gracie D. Chambers, 248 U. S. 387, 39 S. Ct. 149, 63 L. Ed. 318; and Allanwilde Transportation Corp. v. Vacuum Oil Co., 248 U. S. 377, 39 S. Ct. 146, 63 L. Ed. 312, 3 A. L. R. 15. No point of jurisdiction was raised in those cases in any court, as both sides were extremely anxious to have the question authoritatively settled because the embargo had raised many such cases involving in the aggregate a very large sum of money. The courts would not have been eager to take the point sua sponte, as they sometimes do."

Israel et al. v. Moore & MacCormack Co., 295 Fed. 919, 920 (D. C. N. Y.).

This state of the law upon a question of importance should prompt this court to accept the burden of absolute settlement.

III. Conflict with Applicable Decisions of this Court

The denial, in this case, by the Circuit Court of Appeals of a maritime lien against the vessel for freight rightfully returnable, is a decision of a federal question in probable conflict with the three decisions of this court just discussed:

B. L. Harriman v. Emerick, 76 U. S. (9 Wall.) 161, 19 L. Ed. 629 (1870).

Allanwilde Transportation Corp. v. Vacuum Oil Co., 248 U. S. 377, 39 S. Ct. 147, 63 L. Ed. 312, (1919).

International Paper Co. v. Gracie D. Chambers, 248 U. S. 387, 39 S. Ct. 149, 63 L. Ed. 318, (1919).

Respecting these cases, as already observed, they have not been accepted as unqualified recognition by this court of a maritime lien upon a vessel for freight.

Nevertheless, in principle the cases are applicable; and the decision of the Circuit Court of Appeals conflicts therewith. It also violates the essence of a maritime lien arising from an affreightment contract, as declared by this court:

> "The right of a shipper to resort to the vessel for claims growing directly out of his contract of affreightment has very long existed in the general maritime law. It has been asserted in a variety of forms in the Consulado, the most ancient and important of all of the old codes of sea laws (see Chaps. 63, 106, 227, 254, 269), and the maxim that the ship is bound to the merchandise and the merchandise to the ship for the performance of the obligations created by the contract of affreightment, is a settled rule of our maritime law."
>
> *Dupont, DeNemours & Co. v. Vance*, 60 U. S. (19 How.) 162, 168, 169; 15 L. Ed. 584, 586.

Furthermore, the denial of the maritime lien by the Circuit Court of Appeals in the present case is a misapplication of two decisions by this court, cited as authority in its opinion (R. 72, 73.) *Vanderwater v. Mills*, 60 U. S. (19 How.) 82, 90, 15 L. Ed. 554, 556. *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490, 499, 67 L. Ed. 364, 367.

In *Vanderwater v. Mills, supra*, the owners of the vessel "Yankee Blade" and the owners of the vessel "America" contracted as between themselves to employ the "Yankee Blade" on a voyage from New York to Panama, and to employ the "America" on a continuation thereof from Panama to San Francisco for through carriage of cargo and passengers. The "Yankee Blade" refused performance. The owners of the

"America" sued in *rem*. This court rightfully denied the maritime lien asserted, saying:

> "This is nothing more than an agreement for a special and limited partnership in the business of transporting freight and passengers between New York and San Francisco, and the mere fact that the transportation is by sea, and not by land, will not be sufficient to give the court of admiralty jurisdiction of an action for a breach of the contract. It is not one of those to which the peculiar principles or remedies given by the maritime law have any special application, and is the fit subject for the jurisdiction of the common law."

Vanderwater v. Mills, 60 U. S. (19 How.) 82, 92, 15 L. Ed. 554, 557.

In *Osaka Shosen Kaisha v. Pacific Export Lumber Co., supra*, upon the refusal of the master to load all the cargo required by the charter party, a libel in *rem* was filed against the ship by the charterer for damages resulting from such refusal. Again this court denied the maritime lien because there had been no union between the cargo and the ship, saying:

> "The maritime privilege or lien, though adhering to the vessel, is a secret one, which may operate to the prejudice of general creditors and purchasers without notice, and is therefore stricti juris, and cannot be extended by construction, analogy, or inference. Vanderwater v. Mills, supra. The contract of affreightment itself creates no lien, and this court has consistently declared that the obligation between ship and cargo is mutual and reciprocal, and does not

attach until the cargo is on board or in the master's custody. We think the lien created by the law must be mutual and reciprocal; the lien of the cargo owner upon the ship is limited by the corresponding and reciprocal rights of the shipowner upon the cargo."

Osaka Shosen Kaisha v. Pacific Export Lumber Co., 260 U. S. 490, 499, 500; 67 L. Ed. 364, 367.

Neither of the decisions of this court under discussion is applicable on the facts involved. In the first case there was in existence no contract between the shipowner and a cargo owner, the contract being between the owners of two ships creating a partnership arrangement. In the second case under the charter party there was no union of the ship with the particular cargo for which lien was asserted. On the contrary, in the present case there was an affreightment contract, and all of the cargo was loaded.

In the light of the differences of fact, there is no language in either opinion which should be considered as logical basis for the denial of the lien by the Circuit Court of Appeals in the present case. In fact, the declarations of law relative to a maritime lien made by this court in these decisions, and quoted by the Circuit Court of Appeals in its opinion in the present case, could appropriately be repeated by petitioner in support of its claim of a maritime lien.

In the present case the maritime lien asserted is one of the reciprocal rights existent between shipowner and cargo owner. The shipowner was entitled to a maritime lien upon the cargo for the payment of freight less than the agreed amount. Reciprocally, the cargo owner is entitled to a maritime lien for the repayment of freight in excess of the agreed amount.

IV. Conflict with Weight of Authority

The existence of a maritime lien against a vessel to recover freight money in excess of the amount agreed or earned is a question of general maritime law, important in point of legal theory and in point of practical utility in the shipping world.

The decision of the Circuit Court of Appeals for the Ninth Circuit in this case, denying such a lien, is against the great weight of authority upon the subject in the federal courts.

The decisions listed reflect the recognition and adoption of such a lien for repayment of freight money as a part of the general maritime law.

Tatsuuma Kisen Kabushiki Kaisha v. Robert Dollar Co., 31 Fed. (2d) 401 (1929, C. C. A. 9), involved a libel in *rem* by the cargo owner to recover emergency expenses at a port of call (analagous to

freight) wrongfully exacted by the master. The opinion said:

> "The undertaking of a ship to deliver goods as evidenced by the bill of lading is, of course, absolute, except so far as it may be relieved either because the venture was frustrated or by the terms of the bill of lading."
>
> *Tatsuuma K. K. K. v. Robert Dollar Co.*, 31 Fed. (2d) 401, 402.

The facts in *The Capitaine Faure*, 10 Fed. (2d) 950 (1926, C. C. A. 2), are dissimilar; however, the opinion stated:

> "But an action in *rem* lies for the breach of a contract of affreightment, where the goods have been actually delivered and received on board. That such is the established law is not controverted, or in any way questioned in this suit."
>
> *The Capitaine Faure*, 10 Fed. (2d) 950, 961.

The Esrom, 272 Fed. 266 (1921, C. C. A. 2), recognized the lien by the approval given to the ruling in *The Ada*, 233 Fed. 325 (1916, Md. D. C.), resulting from a libel in *rem* for excess freight. The opinion observed:

> "So, too, the ship is then bound and cannot collect further freight at destination."
>
> *The Esrom*, 272 Fed. 266, 271.

The decision in *The Oregon, et al., v. Pittsburgh & Lake Angeline Iron Co.*, 55 Fed. 666, 668, 669, 676,

677 (1898, C. C. A. 6), enforcing a maritime lien for an overcharge of freight, has been discussed heretofore.

In *The Sudbury*, 33 Fed. (2d) 293 (1929, Cal. D. C.), the vessel was conceded to be subject to a lien for general average contribution — essentially similar to freight — as a necessary emergency expense for completion of the voyage. The opinion said:

> "The libel pleads the sums which the 'Sudbury' and cargo should pay and does not set forth the shares due from the Sudbury, which alone is libeled, and which is liable for its shares only."
>
> *The Sudbury*, 33 Fed. (2d) 293.

In *The Emilia S. De Perez*, 22 Fed. (2d) 585 (1927, Md. D. C.), lien against the vessel was enforced for general average, the opinion saying:

> "It therefore follows, from the very nature of general average, and from the principle that 'the vessel is bound to the cargo and the cargo bound to the vessel,' that the vessel must be liable in rem for its portion of the general average loss. The Allianca (D. C.) 64 F. 871, affirmed (C. C. A.) 79 F. 989; Du Pont de Nemours v. Vance, 19 How. 162, 168, 15 L. Ed. 584."
>
> *The Emilia S. De Perez*, 22 Fed. (2d) 585, 586.

The decision in *The Fredensbro*, 18 Fed. (2d) 983, (1927, Pa. D. C.), enforced a maritime lien for the return of prepaid freight.

In the case of *The Henry W. Breyer*, 17 Fed. (2d) 423, (1927, Md. D. C.), shippers successfully asserted a maritime lien to recover prepaid freight.

The court in deciding *The Muskegon*, 10 Fed. (2d) 817, (1927, N. Y. D. C.), granted recovery of duplicate freight by means of a maritime lien against the vessel.

Return of freight money was obtained in *The G. A. Tomlinson*, 279 Fed. 786 (1922, N. Y. D. C.), by resort to a maritime lien.

The decision in *The Ada*, 233 Fed. 325 (1916, Md. D. C.), enforced a maritime lien for excess freight collected by the steamer.

In the opinion of the court in *The Oceano*, 148 Fed. 131 (1906, N. Y. D. C.), which involved closely parallel facts, the existence of a maritime lien for recovery of freight in excess of the amount earned is discussed and recognized, the opinion saying:

> "It follows from the view taken of the subject-matter of this action that the cause may be brought in rem. * * * As soon as the performance of a charter party is commenced a lien exists on the vessel in favor of the shipper or charterer, and a suit in rem may be maintained

for any liability of the master or owner arising therefrom."

The Oceano, 148 Fed. 131, 132, 133.

The opinion in the case of *The Port Adelaide*, 59 Fed. 179 (1893, N. Y. D. C.), by Judge Benedict, discloses the enforcement in favor of the charterer of a lien for freight money improperly collected by the shipowner from shippers permitted to load cargo on a voyage when the whole reach of the ship had been reserved by the charterer. The opinion said:

> "It is said that if the freight collected at Kioto, and paid over to the shipowners, belongs to the charterer, the libelant's claim is against the shipowners for money had and received, and is not within the jurisdiction of the admiralty. But the service performed in earning the freight was a maritime service, and the duties of the respective parties arose out of, and are fixed by, the terms of a charter party of the ship, and the ship was the instrument used in performing the service. Under such circumstances it is my opinion that a maritime lien in favor of the charterer attached to the ship for the amount of the freight earned by the steamship by transporting the cotton from Shanghai to Kioto, and withheld from the charterer by the shipowners."

The Port Adelaide, 59 Fed. 174, 177.

Respecting *The Wyoming*, 36 Fed. 493 (1888, Mo. D. C.), the opinion shows a maritime lien enforced to recover duplicate freight paid by a consignee after

original freight had been collected in behalf of the steamer from the shipper.

The court, in deciding *The St. Joseph*, Fed. Cas. 12230 (1878, Mich. D. C.), allowed a lien as security for a claim based upon a bill of lading requiring the vessel to collect from consignees of cargo the charges accruing to rail carriers for transportation on land prior to receipt of the cargo by the vessel.

The Emma, Fed. Cas. 18218 (1876, Miss. D. C.), shows the enforcement of a maritime lien based upon the failure of the ship carrying goods under a C. O. D. bill of lading to remit to the shipper the value of the goods after deduction of freight charges.

A libel was recognized as available in *The A. M. Bliss*, Fed. Cas. 274 (1872, Mass. D. C.), where the opinion said:

> "If, then, the fact were as is alleged in the libel, that an advance of the freight had been made by the charterers in accordance with the terms of the contract, the advance would, in the absence of an express agreement to the contrary, be recoverable of the owners, if the ship should, for any reason, fail to perform the voyage; and this right might be enforced against the ship."
>
> *The A. M. Bliss*, Fed. Cas. 274, pp. 593, 594.

The Hardy, Fed. Cas. 6056 (1870, Minn. C. C.), involving an affreightment contract obligating the

ship to collect from consignees the sale price of cargo and also freight, enforced a lien against the vessel.

In *The St. Joseph*, Fed. Cas. 3908 (1855, Ill. C. C.), a lien was permitted in collection of an obligation under a general average bond.

In the case of *Church v. Shelton*, Fed. Cas. 2714, (1855, Mass. C. C.), the cargo owner was permitted resort to a maritime lien to collect money fraudulently obtained by the vessel owner through false representations relative to the existence of a salvage lien.

The decision in *The Panama*, Fed. Cas. 10703 (1846, N. Y. D. C.), granted a lien to recover freight advanced for a voyage never performed.

CONCLUSION

The maritime law was especially entrusted by the Constitution to this court for harmony of principle and uniformity of decision in adoption and adaptation in this country. The maritime lien is the distinguishing characteristic of this branch of jurisprudence. All owners of vessels and of cargo, engaged in commerce by water, are concerned in the existence and extent of such a lien for freight money —whether asserted against a vessel or against the cargo.

A maritime lien for freight returnable by the vessel is conducive to promptitude of adjustment, frequent in application, and vital to security of payment in many varying conditions: on shipments by foreign carriers or tramp vessels lacking local representation supporting process in *personam;* in transactions with domestic shipowners having inadequate capital or utilizing single-hull corporations; under affreightments by major lines in times of financial depression; in dealings with general ships covered by various charters and sub-charters, befogging personal responsibility; and in recoveries following sudden embargoes upon goods and unexpected commandeering of vessel tonnage.

Several other cases now pending are in abeyance awaiting the conclusion of this litigation (R. 26, 27, 32, 33).

The decision of the Circuit Court of Appeals for the Ninth Circuit in this case is in conflict with a former decision of the Circuit Court of Appeals for the Sixth Circuit, and is in conflict with the great weight of authority reflecting the maritime law upon the point.

Further, if such decision of the Circuit Court of Appeals for the Ninth Circuit is not in conflict with the applicable decisions of this court, then the ques-

tion of law presented is undetermined by this court, and should be definitely settled in this case.

Hence petitioner respectfully submits that the question of law here presented justifies consideration by this court and the issuance of a writ of certiorari as prayed by the petition.

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